APPEAL NO. 033068
FILED JANUARY 14, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 031679, decided August 4, 2003. We had remanded the case for the hearing officer to determine whether evidence attached to the appellant's (claimant herein) appeal was newly discovered evidence and what weight, if any, to give this evidence. The hearing officer conducted a contested case hearing (CCH) on remand on October 6, 2003. The hearing officer found that the exhibits that the claimant attached to his original appeal were not newly discovered evidence. The hearing officer also stated in his decision that he would give this evidence such minimal weight that it would not change the result in this case. The hearing officer decided that the claimant did not sustain an injury in the form of an occupational disease. The claimant files an appeal arguing the significance of various exhibits and requesting that we reverse the decision of the hearing officer. Respondent 1 (carrier 1 herein) replies that the claimant failed to prove that the evidence he sought to be considered in his first appeal was newly discovered evidence because he failed to show that he could not have discovered this evidence earlier using due diligence. Carrier 1 requests that we affirm the decision of the hearing officer, but asks that we reform a typographical error where the hearing officer uses (incorrect date of injury), as the date of injury rather than _____. Respondent 2 (carrier 2 herein) replies to the claimant's request for review and argues that the decision of the hearing officer should be affirmed. Respondent 3 (carrier 3 herein) also files a response to the claimant's request for review in which it argues that the hearing officer's decision that the evidence sought to be admitted by the claimant was not newly discovered evidence and that the claimant did not suffer a compensable injury should be affirmed. Also in the appeal file is an "*Amicus* Curiae" brief from the claimant's former attorney (attorney herein) in support of the claimant's appeal. This brief raises several issues not raised by the claimant in his own appeal. Carrier 1 argues in its response that we should not consider the "*Amicus* Curiae" brief. As there is no provision for consideration of such briefs by the Appeals Panel in the 1989 Act or in the Texas Workers' Compensation Commission rules, and as there are explicit statements from the claimant in the file that he no longer desires the representation of the attorney, we will not further address the "*Amicus* Curiae" brief.

DECISION

We reform the decision of the hearing officer to read "_____" whenever it reads "(incorrect date of injury)." Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer as reformed.

In our decision in Appeal No. 031679, *supra*, we affirmed the hearing officer's finding that the date of the claimant's alleged injury was _____. In his

decision on remand the hearing officer states that the claimant did not sustain a compensable injury on (incorrect date of injury). This is obviously a typographical error, and we reform the decision of the hearing officer on remand to read "_____" whenever it reads "(incorrect date of injury)."

We summarized the salient facts of the present case in our decision in Appeal No. 031679, *supra*, as follows:

> The claimant's medical condition of avascular necrosis is not in dispute. Causation of his condition is in dispute. The claimant's employer contracted with (company A), a manufacturer of semiconductor computer chips, to do renovation sheet metal work at Buildings 3 and 4, between September and November of 2000. For a two-week period, the claimant cut into ductworks connecting Building 3 and 4 in order to install a tap, a new opening in the duct. The claimant did not wear any type of breathing mask, having been assured that the duct was clean of any harmful chemicals. The claimant and two other witnesses testified to the presence of a jelly like substance inside the duct. Mr. W, a professional engineer and employee of company A, testified that the ducts were clean and that no hydrofluoric acid lines were present in the ductworks in question, denying that any decontamination had taken place prior to the claimant working at the site. Shortly after finishing the job at company A, on November 8, 2000, the claimant began to get sick with various medical ailments. The claimant was eventually diagnosed with avascular necrosis and filed a workers' compensation claim. The claimant testified that he realized that his condition was work related after he read his latest MRI in preparation for filing a disability claim with the Social Security Administration. The claimant testified that he knew his injury was work related on _____.

We will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

As pointed out in our decision in Appeal No. 031679, *supra*, whether or not the evidence attached to the claimant's appeal of the hearing officer's original decision was actually newly discovered evidence involved factual determinations that were difficult for us to make on the record before us at that time. We, therefore, remanded the case to the hearing officer to develop the record and make these findings. The hearing officer held a CCH on remand and took evidence from the parties on these factual issues. The

focus of the CCH was whether or not the claimant exercised due diligence in not earlier obtaining the evidence which he had proferred to us on appeal. Based upon the evidence at the CCH on remand, the hearing officer found that the evidence attached to the claimant's original appeal did not meet the test of newly discovered evidence. We find that the hearing officer's determination in this regard was sufficiently supported by the evidence. We also note that the hearing officer stated in his decision that he would have given the evidence in question minimal weight and it would not have changed his decision in the case.

We note the ultimate question in the present case is whether or not the claimant sustained an injury due to an occupational disease from exposure to chemicals at work. The hearing officer has determined that based upon the evidence the claimant did not sustain such an injury. The question of whether or not a claimant has suffered an injury is one of fact. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, and in light of the conflicting evidence concerning whether or not the claimant sustained an injury due to chemical exposure at work, we affirm the decision of the hearing officer.

The decision and order of the hearing officer on remand are affirmed as reformed.

The true corporate name of insurance carrier 1 is **ROYAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICES COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.

The true corporate name of insurance carrier 2 is **NORTH AMERICAN SPECIALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

The true corporate name of insurance carrier 3 is **EMPLOYERS GENERAL INSURANCE** and the name and address of its registered agent for service of process is

ROBERT RAMSOWER
1601 ELM STREET, SUITE 1600
DALLAS, TEXAS 75201.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Michael B. McShane
Appeals Panel
Manager/Judge

_____
Robert W. Potts
Appeals Judge